84-1601 (3)

Office-Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

No. A-728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

JACK N. GOODMAN *
JOHN A. RITCHIE
ELIZABETH A. FERRELL
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

ALVIN T. PRESTWOOD
Suite 209
One Court Square
Montgomery, Alabama 36104
(205) 832-4120

JOSEPH M. BROWN, JR.
CUNNINGHAM, BOUNDS, YANCE,
CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
(205) 471-6191

Attorneys for Appellees

* Counsel of Record

May 9, 1985

QUESTIONS PRESENTED

1. Whether federal claims which were not presented to the Supreme Court of Alabama until an application for rehearing or afterwards, contrary to established state practice, and which were not passed upon by that court, are within this Court's jurisdiction.

2. Whether an Alabama statute which increases the amount of money damages awarded in civil cases if the judgment is affirmed on appeal raises a substantial federal question.

3. Whether the decision by one justice of the nine-member Supreme Court of Alabama not to disqualify himself in one case presents a substantial question under the Due Process Clause of the Fourteenth Amendment.

4. Whether the imposition by a state of actual and punitive damages sounding in tort for bad faith denial of insurance benefits presents a substantial question under the Contracts Clause and the Eighth Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THE FEDERAL ISSUES RAISED BY AETNA WERE NEITHER PROPERLY PRESENTED NOR CONSIDERED BY THE SUPREME COURT OF ALABAMA	4
A. The Challenge to the Affirmance Statute Was Not Timely	6
B. The Constitutional Issues Concerning Justice Embry Are Not Properly Before This Court	10
C. The Contract Clause and Eighth Amendment Issues Were Not Timely Raised	13
D. Prudential Considerations Dictate Dismissal of this Appeal	15
II. THE FEDERAL QUESTIONS ARE NOT SUBSTANTIAL	17
A. The Alabama Affirmance Statute Does Not Violate the Equal Protection Clause of The Fourteenth Amendment	18
B. The Failure of Justice Embry to Disqualify Himself Raises No Substantial Due Process Question	20
C. The Alabama Decisions Do Not Unconstitutionally Impair Aetna's Contractual Obligations	22
D. The Punitive Damage Award Raises No Substantial Federal Question Under the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment	25
CONCLUSION	27

TABLE OF AUTHORITIES

Cases: Page

Alabama Farm Bureau Mutual Casualty Insurance Co. v. Anderson, 48 Ala. App. 172, 263 So. 2d 149 (1972) 7
Air Movers of America, Inc. v. State National Bank, 293 Ala. 312, 302 So. 2d 517 (1974) 8
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 23, 24
Anderson v. Continental Insurance Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978) 25
Armstrong v. Life Insurance Co. of Virginia, 454 So. 2d 1377 (Ala. 1984) 22
Atlanta, Birmingham & Coast Railway Co. v. Cary, 250 Ala. 675, 35 So. 2d 559 (1948) 9, 10
Barrows v. Jackson, 346 U.S. 249 (1953) 23
Berger v. United States, 255 U.S. 22 (1921) 21
Bowers v. State Farm Mutual Automobile Insurance Co., 460 So. 2d 1288 (Ala. 1984) 21
Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1930) 14, 15
Brown Mechanical Contractors, Inc. v. Centennial Insurance Co., 431 So. 2d 932 (Ala. 1983) 8
Caldwell v. Bechtel, Inc., 631 F.2d 989 (D.C. Cir. 1980) 24
Cardinale v. Louisiana, 394 U.S. 437 (1969) 4, 17
Carter v. Carter, 247 Ala. 209, 23 So. 2d 547 (1946) 9
Central of Georgia Railway Co. v. Steed, 287 Ala. 64, 248 So. 2d 110 (1979) 8, 9
Chapman v. Rivers Construction Co., 284 Ala. 633, 227 So. 2d 403 (1969) 8, 18
Chavers v. National Security Fire & Casualty Co., 405 So. 2d 1 (Ala. 1981) 22
Childress v. Younger, 258 Ala. 219, 61 So. 2d 808 (1952) 8
CIO v. McAdory, 325 U.S. 472 (1945) 14
City of Birmingham v. Bowen, 254 Ala. 41, 47 So. 2d 174 (1950) 9, 19
City of Troy v. McLendon, 279 Ala. 553, 188 So. 2d 281 (1966) 8

TABLE OF AUTHORITIES—Continued

	Page
Cox v. Womack, 274 Ala. 1, 145 So. 2d 201 (1962)	8
Crowell v. Randell, 35 U.S. (10 Pet.) 368 (1836)	15
DeGraaf v. State, 34 Ala. App. 137, 37 So. 2d 130 (1948)	13
Dent v. Foy, 210 Ala. 160, 97 So. 627 (1923)	9
Dewey v. Des Moines, 173 U.S. 193 (1899)	5
Dickey v. Alabama Farm Bureau, 447 So. 2d 693 (Ala. 1984)	22
Dumas v. Southern Guaranty Insurance Co., 408 So. 2d 86 (Ala. 1981)	3
Egan v. Mutual of Omaha Insurance Co., 24 Cal. App. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979)	25
Ex parte Hanna, 267 Ala. 527, 103 So. 2d 720 (1958)	7
Ex parte Watkins, 32 U.S. (7 Pet.) 357 (1833)	26
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	7, 12
FTC v. Cement Institute, 333 U.S. 683 (1948)	21
First Alabama Bank of Montgomery, N.A. v. Martin, 425 So. 2d 415 (Ala. 1982), *cert. denied*, 461 U.S. 938 (1983)	8
Frazier v. Lowndes County Board of Education, 710 F.2d 1097 (5th Cir. 1983)	23
Furman v. Georgia, 408 U.S. 238 (1972)	27
Gallups v. United States Steel Corp., 353 So. 2d 1169 (Ala. Civ. App. 1978)	13
Garvin v. Shewbart, 442 So. 2d 80 (Ala. 1983)	22
Gautreux v. Harang, 190 La. 1060, 183 So. 349 (1938)	6
Gibson v. Berryhill, 411 U.S. 564 (1973)	20
Gibson v. Fidelity & Casualty Co. of New York, 454 So. 2d 526 (Ala. 1984)	22
Goodyear Tire & Rubber Co. v. Downey, 266 Ala. 344, 96 So. 2d 278 (1957)	9
Green v. First National Bank of Tuskaloosa, 49 Ala. App. 426, 272 So. 2d 895 (1971), *rev'd on other grounds*, 290 Ala. 14, 272 So. 2d 901 (1972)	7

TABLE OF AUTHORITIES—Continued

Page

Gruenberg v. Aetna Life Insurance Co., 9 Cal. App. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973) 25
Gulf Atlantic Insurance Co. v. Barnes, 405 So. 2d 916 (Ala. 1981) 3
Illinois v. Gates, 462 U.S. 213 (1983) 4, 5, 15
Ingraham v. Wright, 430 U.S. 650 (1977) 26
In re Murchison, 349 U.S. 133 (1955) 20
King v. Reid, 428 So. 2d 611 (Ala. 1983) 7
Kirkland v. Kirkland, 281 Ala. 42, 198 So. 2d 771 (1967) 6
Laird v. Tatum, 409 U.S. 824 (1972) 21
Lindsey v. Normet, 405 U.S. 56 (1972) 18, 19
Lloyd v. Stewart, 258 Ala. 627, 64 So. 2d 884 (1953) 8
Lomenick v. Hartford Accident and Indemnity Co., 189 So. 2d 731 (La. App. 1966) 6
Louisville & Nashville Railroad Co. v. Stewart, 241 U.S. 261 (1916) 9, 19
Lovett v. Uptain, 450 So. 2d 113 (Ala. Civ. App. 1983) 6
Mariniello v. Shell Oil Co., 511 F.2d 853 (3d Cir. 1975) 23
Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 20
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 16
McPherson v. Buick Motor Co., 217 N.Y. 382, 11 N.E. 1050 (1916) 24
Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942) 5
Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921) 26
Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 678, 87 So. 205 (1920) 9
National Savings Life Insurance Co. v. Dutton, 419 So. 2d 1357 (Ala. 1982) 4
National Security Fire & Casualty Co. v. Vintson, 454 So. 2d 942 (Ala. 1984) 22

TABLE OF AUTHORITIES—Continued

	Page
New York Life Insurance Co. v. Reese, 201 Ala. 673, 79 So. 245 (1918)	9
Noble v. National American Life Insurance Co., 128 Ariz. 188, 624 P.2d 866 (1981)	24
Orr v. Orr, 440 U.S. 268 (1979)	10
Patterson v. Gains, 264 Ala. 184, 85 So. 2d 893 (1956)	8
Payne v. Nationwide Mutual Insurance Co., 456 So. 2d 34 (Ala. 1984)	22
Propst v. Board of Educational Lands and Funds, 103 F. Supp. 457 (D. Neb. 1951), *appeal dismissed*, 343 U.S. 901 (1952)	23
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	14
Putnam v. City of Huntsville, 48 Ala. App. 33, 261 So. 2d 754 (1972)	7
Robinson v. California, 370 U.S. 660 (1962)	27
Safeco Insurance Co. v. Sims, 435 So. 2d 1219 (Ala. 1983)	4
Shotwell Manufacturing Co. v. United States, 371 U.S. 341 (1963)	13
Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858 (1934)	8, 9
Solem v. Helm, 103 S. Ct. 3006 (1983)	26
State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945)	15
Stewart v. State Farm Insurance Co., 454 So. 2d 513 (Ala. 1984)	22
Street v. New York, 394 U.S. 576 (1969)	12
Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924)	23
Uphaus v. Wyman, 360 U.S. 72 (1958)	26
Valmont Industries, Inc. v. Enresco, Inc., 446 F.2d 1193 (10th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972)	13
Vance v. Bradley, 440 U.S. 93 (1979)	18
Vincent v. Blue Cross-Blue Shield of Alabama, Inc., 373 So. 2d 1054 (Ala. 1979)	25
Watkins v. Life Insurance Co. of Georgia, 456 So. 2d 259 (Ala. 1984)	21

TABLE OF AUTHORITIES—Continued

	Page
Webb v. Webb, 451 U.S. 493 (1981)	17
Withrow v. Larkin, 421 U.S. 35 (1975)	20
Wood v. Georgia, 450 U.S. 261 (1981)	15
Constitutional Provisions:	
U.S. Const. art. I, § 10	*passim*
U.S. Const. amend. VIII	*passim*
U.S. Const. amend. XIV	*passim*
Statutes:	
Ala. Code § 12-22-72 (1975)	*passim*
Miscellaneous:	
Ala. Canons of Judicial Ethics 3C(1)	20
Ala. R. App. P. 40	6, 12, 14
Ala. R. Civ. P. 60	13
D. Dobbs, *Remedies* (1973)	25
Fed. R. Civ. P. 60	13
L. Tribe, *American Constitutional Law* (1978)	23
16 C. Wright, A. Miller, E. Cooper and E. Gressman, *Federal Practice and Procedure* (1977)	4, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. A-728

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, Appellees move to dismiss this appeal on the grounds that 1) the federal questions sought to be reviewed were not timely and properly raised before the Supreme Court of Alabama and were not passed on by that court; and 2) the federal questions presented are not substantial.

STATEMENT OF THE CASE

In this case, Appellant Aetna Life Insurance Company (Aetna) seeks this Court's review of a decision of the Supreme Court of Alabama affirming a judgment against Aetna for actual and punitive damages resulting from Aetna's bad faith refusal to honor an insurance claim presented by Appellees Margaret W. Lavoie and Roger J. Lavoie, Sr. The Jurisdictional Statement carefully avoids mention of any of the facts on which the Alabama courts based their decisions [1] and wrongly characterizes

---

[1] Significantly, none of the dissenting members of the Alabama court disputed the factual conclusions which support the majority opinion. The facts recited here, therefore, represent the unanimous holding of the Supreme Court of Alabama.

the Alabama Supreme Court's decision as one radically altering the facts found by the trial court and the state of the law of bad faith in Alabama.

The Alabama court summarized the evidence concerning Aetna's conduct which brought on the litigation as follows:

> "(1) Aetna took the position that a woman who was bleeding bright red blood from the rectum, had flight of ideation, was acutely ill, and demonstrated personality changes, should have been treated as an outpatient.
>
> "(2) Aetna made its initial denial of the subject claim without any legal justification, and with no medical opinion to support the denial of a complicated medical treatment claim.
>
> "(3) Aetna made a second denial without any medical decision whatsoever, in violation of the established company procedure for handling such claims.
>
> "(4) Upon receiving medical letters detailing the need for hospital confinement and letter of inquiry from Lavoie's attorney, Aetna decided to wait to see if the Lavoies were going to file suit.
>
> "(5) Aetna made a third denial of the claim without any medically qualified opinion to support the denial, again in violation of the company's established procedures.
>
> "(6) Aetna intentionally misrepresented to the Lavoies that the claim had been repeatedly reviewed by members of the medical department.
>
> "(7) Aetna never had the 'most important medical information' available on this file reviewed by any medical doctor during the course of the four denials." App. 35a-36a [2]

---

[2] App. —— refers to the Appendix to the Jurisdictional Statement.

Further, the Alabama court pointed to evidence of misconduct by Aetna after the litigation began, including the use of an affidavit to support a motion for summary judgment which Aetna knew was contradicted by the affiant's deposition testimony, and false testimony from key Aetna witnesses at trial which contradicted earlier testimony or was subsequently admitted to be false by the witness. (App. 36a-38a). Based on this evidence, the Alabama court held that "[t]he jury could have rightfully concluded, and apparently did, that [this] was nothing more than an attempt to cover-up, through deceit, past frauds committed in handling the Lavoie claim." (App. 37a).

Aetna claims that the Alabama Supreme Court wrongly based its opinion on "findings" of fraud and conspiracy. However, the Alabama cases prior to this one made clear that the tort of bad faith denial of an insurance claim is "merely a species of fraud," *Dumas v. Southern Guaranty Insurance Co.*, 408 So. 2d 86, 89 (Ala. 1981), involving a "breach of a known duty, *i.e.*, good faith and fair dealing, through some motive of self-interest or ill-will." *Gulf Atlantic Insurance Co. v. Barnes*, 405 So. 2d 916, 924 (Ala. 1981). It was entirely normal, therefore, for the court to refer to "fraud" in discussing Aetna's conduct without in any way implying a cause of action other than the one on which the trial court granted judgment.

Aetna repeatedly states that the decision of the Supreme Court of Alabama overruled two earlier cases which, Aetna claims, held that no bad faith denial could be found when either (1) a partial payment had been made, or (2) a directed verdict on the underlying contract claim would not have been proper. Neither contention is supported by the prior Alabama cases.

While an earlier case suggested that as a general matter partial payments would be persuasive evidence of a lack of bad faith, the determination remained one of fact. The majority below found that the facts in this record

showing bad faith outweighed any favorable inference stemming from Aetna's partial payment (App. 33a). Justice Maddox' dissent agreed that a "partial payment by an insurer of a claim would [not] preclude a finding of bad faith refusal to pay. . . ." (App. 62a).

As to the necessity of a directed verdict, subsequent to the decision in *National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982), relied upon by Aetna, the Alabama court pointed out in *Safeco Insurance Co. v. Sims*, 435 So. 2d 1219, 1223 (Ala. 1983), that "[t]he standard for testing a bad faith claim is not found in either the adjudication of a justiciable controversy or the judgment on the merits of the contract claim." Justice Jones' concurring opinion in *Safeco* also noted that "[t]his 'directed verdict on the contract claim' test is not to be read as requiring in every case . . . that the tort claim be barred unless the trial court has literally granted plaintiff's motion for a directed verdict. . . ." *Id.* at 1225. Contrary to Aetna, the Alabama court's opinion here did not overturn settled law. As Chief Justice Torbert noted in dissent, "a blind adherence to the directed verdict rule would essentially abolish the tort." (App. 54a).

ARGUMENT

I. THE FEDERAL ISSUES RAISED BY AETNA WERE NEITHER PROPERLY PRESENTED TO NOR CONSIDERED BY THE SUPREME COURT OF ALABAMA

It is a fundamental prerequisite of this Court's jurisdiction over a decision from a state court that the issues sought under federal law have been presented to and decided by the highest state court. *Illinois v. Gates*, 462 U.S. 213 (1983); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022 (1977). Aetna concedes (Jurisdictional Statement at 8) "that it has the burden of persuading this Court that

it has jurisdiction over this appeal and that there is no jurisdictional or prudential bar to this Court's deciding each of the four questions presented."

Through a tangle of reasoning, in which the basis of each claim appears to rest on the acceptance of another, Aetna argues that, despite the fact that none of its constitutional arguments were addressed by the Alabama Court, all of them were either properly presented or, if not timely raised, are nonetheless entitled to be reviewed on prudential grounds. Further, Aetna argues (Jurisdictional Statement at 14) that if one of the issues was properly raised, a lesser standard should apply to determine whether review could be had of the remaining questions. This is contrary to *Illinois v. Gates*, in which, despite the fact that a federal issue concerning the application of the Fourth Amendment had been raised below, the Court held that a separate issue concerning the scope of the exclusionary rule which had not been pressed in the state courts could not be entertained. That holding followed the settled rule of *Dewey v. Des Moines*, 173 U.S. 193 (1899), that this Court's review is confined to federal questions which are presented on the record before it, and does not include other federal questions that might have been, but were not, pressed below.

In *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942), the federal issue was first raised in a brief to the Tennessee Supreme Court. This Court dismissed an appeal because:

> "Appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court . . . and appellant's burden is to show affirmatively that we have jurisdiction."

Applying these principles to the case at bar, Aetna has not satisfied its burden of showing that any of the four constitutional claims pressed in this Court were properly presented under Alabama practice to the state court. Therefore, the appeal should be dismissed.

A. The Challenge to the Affirmance Statute Was Not Timely

The first mention of Aetna's constitutional challenge to the application of Ala. Code section 12-22-72 came in its brief filed December 28, 1984 in support of its application for rehearing.[3] "Ordinarily the federal question is presented too late if it . . . is not advanced until a petition for rehearing addressed to the decision of the highest state court." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022 at 701 (1977).

Alabama procedure does not permit parties to raise new questions on rehearing. In *Kirkland v. Kirkland*, 281 Ala. 42, 198 So. 2d 771, 777 (1967), the Supreme Court of Alabama held:

> "We cannot sanction the practice of bringing up new questions for the first time in application for rehearing. Robinson v. Allison, 97 Ala. 596, 604, 12 So. 382, 604 [sic].
>
> "An application for rehearing on ground not argued or suggested until after our judgment was rendered cannot now be considered."

Similarly, in *Lovett v. Uptain*, 450 So. 2d 113, 116 (Ala. Civ. App. 1983), the court stated:

> "After an opinion has been rendered by an appellate court, consideration may not be given on rehearing to issues which were not argued nor suggested upon the initial submission of the case."

---

[3] No mention of the constitutional issue was made in Aetna's application for rehearing filed the week before. Ala. R. App. P. 40 requires briefs to be filed at the same time as the application for rehearing. Aetna apparently was granted an extension of time within which to file its brief. In an identical situation, the Supreme Court of Louisiana held that an extension of time for the brief "does not give [counsel] the right to raise issues therein that had not heretofore been made in his application for rehearing," and refused to consider a new argument. Gautreux v. Harang, 190 La. 1060, 183 So. 349, 374 (1938); *see* Lomenick v. Hartford Accident and Indemnity Co., 189 So. 2d 731 (La. App. 1966).

See Green v. First National Bank of Tuskaloosa, 49 Ala. App. 426, 272 So. 2d 895, 901 (1971), *rev'd on other grounds*, 290 Ala. 14, 272 So. 2d 901 (1972); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Anderson*, 48 Ala. App. 172, 263 So. 2d 149 (1972); *Putnam v. City of Huntsville*, 48 Ala. App. 33, 261 So. 2d 754 (1972). This prohibition is an extension of the general Alabama rule against new issues being presented on appeal. In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), this Court specifically recognized that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." [4]

Aetna argues nevertheless that its claims were properly presented because the Alabama courts have not in practice enforced the prohibition on late presentation of new claims. For example, although recognizing (Jurisdictional Statement at 15) that the Alabama courts have held that new issues cannot be raised on appeal, Aetna claims that the Alabama court's actual practice has been to the contrary. The two cases it cites, however, do not support its contention. In *King v. Reid*, 428 So. 2d 611 (Ala. 1983), the appellant sought on appeal to challenge the constitutionality of an Alabama statute under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of Alabama held that "the record discloses that these issues were not presented to the court below, and thus review of them is foreclosed here." *Id.* at 615. In *Ex parte Hanna*, 267 Ala. 527, 103 So. 2d 720 (1958), since the appellant's constitutional argument was plainly without merit, the court found that it did not have to reach the procedural issue.

---

[4] Aetna suggests that the Alabama practice should essentially be disregarded because it is not expressed in a formal rule or specifically directed to constitutional issues. Aetna cites no authority, nor supplies any argument, why the established practice of a state court should be regarded as any less controlling than a rule, or why Alabama must accord constitutional arguments a different procedural treatment than others.

Turning specifically to the procedure involving the Alabama affirmance statute, Aetna claims that since the penalty only is applied when a judgment is affirmed, it would not have been "logical" to challenge the statute before rehearing. Aetna cites *Central of Georgia Railway Co. v. Steed*, 287 Ala. 64, 248 So. 2d 110 (1979), and fifteen other cases in support of its argument.

Aetna cites no rule or practice of the Alabama court which indicates that arguments concerning the affirmance statute must await rehearing.[5] The Alabama courts have held that, assuming the conditions in the statute are met, the application of the penalty is a ministerial act. *See Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934). Aetna, therefore, had to have been aware that if the trial court's judgment were affirmed, the penalty would automatically attach, and Aetna's decision not to make its constitutional arguments in its briefs on appeal must be viewed as one of its own litigation strategy.

The cases cited by Aetna also do not establish that the practice it followed was proper. In eleven of the cited cases, the rehearing petition was filed by the appellee seeking to have the penalty awarded, rather than the appellant contending that its application was improper.[6]

---

[5] Arguments concerning the application of the affirmance statute have been made in parties' main briefs and considered prior to rehearing. *See, e.g.*, Air Movers of America, Inc. v. State National Bank, 293 Ala. 312, 329, 302 So. 2d 517, 533 (1974); Cox v. Womack, 274 Ala. 1, 2-3, 145 So. 2d 201, 203 (1962).

[6] Brown Mechanical Contractors, Inc. v. Centennial Insurance Co., 431 So. 2d 932 (Ala. 1983); First Alabama Bank of Montgomery, N.A. v. Martin, 425 So. 2d 415 (Ala. 1982), *cert. denied*, 461 U.S. 938 (1983); Chapman v. Rivers Construction Co., 284 Ala. 633, 227 So. 2d 403 (1969); City of Troy v. McLendon, 279 Ala. 553, 188 So. 2d 281 (1966); Patterson v. Gains, 264 Ala. 184, 85 So. 2d 893 (1956); Lloyd v. Stewart, 258 Ala. 627, 64 So. 2d 884 (1953); Childress v. Younger, 258 Ala. 219, 61 So. 2d 808 (1952); Carter

In those cases, since the appellee was defending the judgment, it could assume the automatic application of the penalty upon affirmance. Only when the clerk did not add the statutory penalty was there any reason to argue the point, and thus rehearing was the first opportunity to raise the issue.[7]

Thus, in only four cases has the Alabama court considered on the merits an appellant's application for rehearing arguing that the affirmance penalty should be removed. In one case, the issue presented was one of first impression—whether the statute applied to cases under the Alabama court's certiorari jurisdiction. *Goodyear Tire & Rubber Co. v. Downey*, 266 Ala. 344, 96 So. 2d 278 (1957). In *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174 (1950), the city raised the point—also one of first impression—that since it was not required to post a bond to appeal, it did not come within the terms of the statute. Only two of the cases cited by Aetna present a situation similar to the one at bar—a challenge by an appellant to the regular application of the affirmance statute first raised after the initial decision on appeal. In *Atlanta, Birmingham & Coast Railway Co. v. Cary*, 250 Ala. 675, 35 So. 2d 559 (1948), the appellant filed a motion to amend the judgment of affirmance, apparently arguing that the affirmance statute was unconstitutional. The motion was denied based on this Court's holding in *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261 (1916). And in *Central of Georgia Railway Co. v. Steed*, 287 Ala. 64, 248 So. 2d 110 (1979),

---

v. Carter, 247 Ala. 209, 23 So. 2d 547 (1946); Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858 (1934); Dent v. Foy, 210 Ala. 160, 97 So. 627 (1923); New York Life Insurance Co. v. Reese, 201 Ala. 673, 79 So. 245 (1918).

[7] In Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 678, 87 So. 205 (1920), the court originally affirmed the trial court, but on rehearing the case was remanded for further proceedings, and the court in connection with the rehearing on the merits noted that the affirmance statute did not apply.

a similar contention raised on rehearing was denied on the authority of *Atlanta, Birmingham.*

Contrary to Aetna, therefore, there has been no routine acceptance of arguments concerning the affirmance statute by appellants on rehearing. The fact that the Supreme Court of Alabama has proceeded to consider such arguments in a few cases does not permit invocation of this Court's jurisdiction where the federal argument was not considered below. In *Orr v. Orr*, 440 U.S. 268 (1979), also an appeal involving the constitutionality of an Alabama statute, the constitutional claim was first presented on appeal, but was considered by the Alabama court without objection. This Court noted that:

> "This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear [the] constitutional objection on that ground, we might have been without jurisdiction to consider it here."

Id. at 274. Since the constitutional argument was considered below, jurisdiction was established. However, the Court noted that its conclusion "does not preclude any other State, *or even Alabama in another case,*" from concluding that the constitutional argument made in *Orr*, raised in the same manner, would be too late to be considered. *Id.* at 275 n.4 (emphasis added). That is the case here. The fact that the Alabama court declined to enforce its prohibition of new arguments on rehearing in one case in almost thirty years does not excuse Aetna from its tardiness. Since the matter was neither properly raised nor considered by the Supreme Court of Alabama, this Court has no jurisdiction to consider Aetna's appeal challenging the Alabama affirmance statute.

B. The Constitutional Issues Concerning Justice Embry Are Not Properly Before This Court

Aetna's contentions regarding the participation of Justice Embry and the other justices of the Supreme Court

of Alabama [8] were neither presented prior to the decision of the Alabama court nor in Aetna's application for rehearing. They were instead first raised in a motion to disqualify filed on February 21, 1985, and pressed again in a second application for rehearing on March 22, 1985.[9] The motion was denied on March 8, 1985 (App. 64a-73a) and the second application was summarily denied on March 25, 1985 (App. 74a-75a).

The motion was denied on the basis of each justice's individual decision that he was not disqualified (App. 64a). There was no mention of the constitutional argument in either the court's per curiam order or in the two concurring opinions (App. 64a-73a). Aetna contends (Jurisdictional Statement at 10) that its claim is properly before this Court because the Alabama court decided "a procedural aspect of appellant's disqualification challenge, *i.e.*, whether an individual Justice should or would pass on the qualifications of the other individual Justices . . ." and Aetna's substantive claim that the five justices who joined in the court's opinion were disqualified. These arguments distort what actually occurred below and do not demonstrate that this Court has jurisdiction to consider Aetna's constitutional argument concerning Justice Embry.

Aetna's brief in support of its motion to disqualify did not at any point suggest what procedure the Alabama

---

[8] Although Aetna argued to the Alabama court that all of its members were tainted by their participation, *inter alia*, in the decision with Justice Embry (Brief in Support of Motion for Disqualification, Aetna Life Insurance Co. v. Lavoie, Ala. S. Ct. No. 82-426 (Feb. 21, 1985) at 5-7), it apparently has abandoned its argument with respect to the members of the Alabama court other than Justice Embry. Jurisdictional Statement at 9 n.2.

[9] Under Alabama procedure, it would appear that these were either attempts to broaden Aetna's application for rehearing long after the expiration of the time limits in Ala. R. App. P. 40, or to file a second application for rehearing which is prohibited unless the court first modifies its original action. *Id.*

court should follow in deciding whether its members were disqualified. The relief sought was disqualification of Justice Embry and of the remaining justices, and withdrawal of the court's opinion. Nothing was said about whether these decisions should be made individually or collectively. Aetna simply has no basis for claiming that the procedure the Supreme Court of Alabama chose to employ in any way represented a decision on Aetna's federal claim.

Further, there is no indication that any of the justices considered Aetna's constitutional argument, which rested on an assumed conclusion that the justices were biased. The decision denying the motion appears to rest on the ground that the members of the court, applying Alabama standards of judicial conduct, found that they were not disqualified from hearing Aetna's appeal. In these circumstances, where there was an implicit finding of no improper bias, there would have been no reason for the court to go on to consider an argument that the federal Constitution required disqualification. Contrary to Aetna's argument, therefore, the denial of Aetna's motion to disqualify did not represent a decision on Aetna's federal claim.[10]

Aetna argues, however, that even if its constitutional argument was not addressed by the Alabama Supreme Court, the argument was properly presented and is within this Court's jurisdiction. There is no merit to this argument for, as noted above, Aetna did not raise this claim until well after its application for rehearing and utilized a procedure which is outside the scope of the Alabama Rules of Appellate Procedure.

---

[10] As the Court recognized in *Exxon*, when the highest state court does not address a federal question, it will be assumed that the omission was due to improper presentation, unless affirmatively shown to the contrary. 462 U.S. at 181 n.3; *see* Street v. New York, 394 U.S. 576, 582 (1969).

Further, while Aetna claimed that the facts upon which its claim was based were newly discovered, it made no effort to establish why it could not have discovered the relevant facts before more than a year had passed since the filing of the two suits by Justice Embry. Aetna's motion, which sought a new hearing on the basis of newly discovered evidence, is analogous to a motion for a new trial under Ala. R. Civ. P. 60 or Fed. R. Civ. P. 60. It is the burden of those seeking a new trial to demonstrate why through "due diligence" the evidence relied on could not have been discovered earlier. *Gallups v. United States Steel Corp.*, 353 So. 2d 1169 (Ala. Civ. App. 1978); *see Valmont Industries, Inc. v. Enresco, Inc.*, 446 F.2d 1193 (10th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); *see also Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 361-62 (1963). Since Aetna did not offer any explanation of the circumstances of its discovery, by a parity of reasoning, Aetna cannot maintain that its federal claim was properly presented. Thus, like Aetna's arguments concerning the affirmance statute, its constitutional arguments arising out of Justice Embry's participation in the Supreme Court of Alabama's decision were not timely presented to nor decided by the Alabama court, and cannot be considered by this Court.

C. The Contract Clause and Eighth Amendment Issues Were Not Timely Raised

Aetna first mentioned a claim under the Eighth Amendment in its application for rehearing. Its Contract Clause argument was not presented until its motion for disqualification on February 21, 1985.[11] Neither argument

---

[11] Aetna contends (Jurisdictional Statement at 13) that the Contract Clause argument could have been deduced from the Eighth Amendment and Due Process arguments in the brief supporting its first application for rehearing. The Alabama courts, however, will not consider arguments for which no authority is cited. *See* DeGraaf v. State, 34 Ala. App. 137, 144, 37 So. 2d 130,

was considered by the Supreme Court of Alabama. For the same reasons which apply to Aetna's argument concerning the Alabama affirmance statute, these arguments were not timely raised and, therefore, are not within this Court's jurisdiction.[12]

Aetna claims that its late presentation should be excused under the doctrine of *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff* and the cases following it, the Court has held that late-presented federal issues may be considered when they arise as the result of an unexpected and unanticipated holding by the state court. In *Brinkerhoff*, the Supreme Court of Missouri held that the petitioners were guilty of laches for failing to take advantage of an administrative remedy, overruling the same court's previous decision that the administrative remedy did not exist. The petitioners on rehearing for the first time argued that the retroactive application of this holding denied them due process, and Justice Brandeis, writing for this Court, held that the federal issue was timely presented because there could have been no earlier opportunity to raise it. The unexpected decision thus was directly related to the issue subsequently raised.[13]

---

137 (1948); *see also* CIO v. McAdory, 325 U.S. 472, 477 (1945). Since the Contract Clause was not mentioned in Aetna's brief on rehearing, there can be no contention that Aetna then properly presented the issue, particularly since, as Aetna concedes (Jurisdictional Statement at 18), the application of the Contract Clause it espouses is unprecedented.

[12] This is particularly the case with Aetna's Contract Clause argument. Ala. R. App. P. 40 provides that "[n]o second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court." The issues raised for the first time in the motion for disqualification, therefore, were specifically barred from consideration by the Alabama rules.

[13] Similarly, in PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-86 n.9 (1980), an argument first presented on appeal to the

Aetna's arguments in this case, however, do not fall within this exception. The Supreme Court of Alabama here affirmed the judgment of the trial court. And while Aetna contends that it was surprised by certain aspects of the Supreme Court's decision, it does not explain how the rationale employed by the Supreme Court for the first time created an opportunity to argue that the Eighth Amendment and the Contract Clause had been offended. Both the fact of a judgment against Aetna on a tort claim and the size of the punitive damages award were fully evident when Aetna filed its brief on appeal and were not significantly changed by the Alabama Supreme Court's decision. Thus, Aetna's reliance on *Brinkerhoff* is misplaced and its claims under the Eighth Amendment and the Contract Clause are not properly before this Court.

D. Prudential Considerations Dictate Dismissal of this Appeal

Finally, Aetna argues that despite its failure to timely raise its constitutional arguments before the Alabama courts, this Court may review the decision of the Supreme Court of Alabama because the prudential considerations which normally dictate that the Court not review questions on which the state court has not passed are inapplicable. To the contrary, the purposes which have been identified as supporting the rule against hearing issues not presented and considered are fully applicable in the instant case, and support dismissal.[14]

California Supreme Court was deemed timely because in the lower courts the appellants had relied on a California decision which was subsequently overruled.

[14] Further, while Aetna assumes that the rule is not jurisdictional (Jurisdictional Statement at 14), this Court's decisions leave the matter in doubt. *Compare* Wood v. Georgia, 450 U.S. 261 (1981), *with* State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945), *and* Crowell v. Randell, 35 U.S. (10 Pet.) 368 (1836); *see generally* Illinois v. Gates, 462 U.S. 213, 218-19 (1983).

Aetna argues that its Eighth Amendment and Contract Clause claims should be deemed timely because, if its arguments with respect to Justice Embry are well taken, it never had an opportunity to present its claims, and further, that since it believes the Court has jurisdiction over its first two federal claims, there is no reason not to consider other claims even if not timely presented below. These arguments entirely rest on a key but erroneous assumption—that Aetna's first two arguments were timely raised. Further, it is simply absurd to contend that the alleged bias of Justice Embry—of which Aetna claims it was unaware when it prepared its brief in the Alabama court—justifies Aetna's failure timely to make its constitutional arguments.

A "due regard for appropriate relationship of this Court to state courts," [15] dictates that Aetna's appeal be dismissed. In this case, Aetna challenges obligations which the Alabama courts have found apply to insurance companies. The Alabama court is entitled to an opportunity to decide whether its decisions are constitutional and explain its reasons prior to review by this Court. Since the underlying cause of action here is one wholly of state law, this Court should not intrude without a full explication of the state court's determination, an explication that is absent from the present record.

Further, contrary to Aetna's contentions, the facts relevant to a decision by this Court are not established. Aetna's claim that Justice Embry should have been disqualified is based entirely on the submissions made by Aetna in its two motions. There was no opportunity below for exploration of the extent of any overlap between the issues in the present case and the two suits filed by Justice Embry, or determination of the precise posture of the cases in which Justice Embry was in-

---

[15] McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940).

volved. As the Court recognized in *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), the record in this Court is likely to be inadequate on questions which were not raised below.

In *Webb v. Webb*, 451 U.S. 493, 499 (1981), the Court emphasized:

> "that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below."

This principle fully applies in this case and the Jurisdictional Statement should be dismissed.

II. THE FEDERAL QUESTIONS ARE NOT SUBSTANTIAL

Assuming, *arguendo*, that the issues presented by Aetna are properly before this Court, the appeal should nonetheless be dismissed for want of a substantial federal question. The decision of the Supreme Court of Alabama affirmed a judgment against Aetna for violating a state-created duty to treat its insureds fairly and did so on the basis of evidence of extraordinarily egregious conduct by Aetna. The recognition of a duty between an insurer and its insureds, and the application of that duty to the circumstances of a particular case, are matters totally of state law. The arguments now pressed by Aetna are merely an effort to have this Court intrude itself into the development of Alabama tort law. That they are peripheral to the issues in the case is indicated by the fact that Aetna never sought to raise them until the last moment before seeking this Court's review. The four issues are insubstantial and the appeal should therefore be dismissed.

A. The Alabama Affirmance Statute Does Not Violate the Equal Protection Clause of the Fourteenth Amendment

Ala. Code section 12-22-72 provides for the assessment of ten percent damages against an appellant if a money judgment is affirmed on appeal. Aetna contends that this statute contravenes the Equal Protection Clause of the Fourteenth Amendment because it overinclusively discourages meritorious appeals and underinclusively applies only to defendant-appellants. However, because no suspect class or fundamental right is involved, the statute will withstand an equal protection challenge if it is rationally related to furthering a legitimate state objective. *See Lindsey v. Normet*, 405 U.S. 56, 78 (1972). (1979). This Court has indicated that it "will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the legislature's actions were irrational." 440 U.S. at 97.

In enacting section 12-22-72, the Alabama legislature intended to discourage frivolous and dilatory appeals. *Chapman v. Rivers Construction Co.*, 284 Ala. 633, 227 So. 2d 403, 415 (1969). Such a legislative purpose has been recognized by this Court as a legitimate state objective. *See Lindsey v. Normet*, 405 U.S. 56, 78 (1972). The inquiry, then, is whether this statutory scheme is "reasonably tailored to achieve these ends and [whether it is] uniformly and nondiscriminatively applied." *Id.* at 78.

Unlike the statute at issue in *Lindsey* which arbitrarily imposed a double-bond requirement only on tenant defendant-appellants, section 12-22-72 applies to *all* appellants having money judgments entered against them in the trial below. The class of appellants is not restricted to defendants, but includes a plaintiff who has had judgment entered against it on a counterclaim. The rationale behind such a classification is readily apparent—an un-

successful litigant facing payment of a money judgment will tend to protract the litigation process as long as possible so that he may benefit from the funds rightfully owing to the other party. Plaintiffs who do not receive a judgment at trial do not have a similar interest in prolonging litigation. Section 12-22-72 discourages frivolous appeals intended for delay and makes no arbitrary classification between similarly situated persons unrelated to the reasonable objectives of the statute.

In *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174 (1950), the court indicated another purpose for the statute—"to provide appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered." *Id.* at 47, 47 So. 2d at 180. As this Court recognized in *Lindsey*, Alabama is not required to provide any appellate review, 405 U.S. at 77, and therefore may condition availability of the right to an appeal. In *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261 (1916), Justice Holmes, writing for the Court, considering an attack on a statute similar to Alabama's, held that "[t]here was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld." The provision of additional damages to those who have had satisfaction of their judgments delayed is a rational objective which supports the Alabama statute.

Aetna's reliance on *Lindsey v. Normet* is misplaced. The statute in *Lindsey* placed an impediment on a group —tenants—which was the least likely to be able to meet it. 405 U.S. at 79. No similar contention could be made about a penalty which applies to those against whom a money judgment has been awarded. Further, all of the interests which the statute identified in *Lindsey* as the reasons for the double-bond requirement were fully satisfied by other requirements in the Oregon statute. Aetna

has not argued that section 12-22-72 is improperly duplicative of other protections created by Alabama. Thus, Aetna's contention that the affirmance statute presents a substantial question of constitutional dimensions is clearly without merit.

B. The Failure of Justice Embry to Disqualify Himself Raises No Substantial Due Process Question

The issue of disqualification presented by Aetna is not of a constitutional magnitude. This appeal does not involve a criminal defendant's Sixth and Fourteenth Amendment right to a fair trial, *e.g.*, *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955), nor does it involve a statutory scheme which is challenged as creating an unconstitutional risk of basis in the adjudicator. *E.g.*, *Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973). Indeed, Aetna does not assert that Alabama appellate procedure operates to violate its due process rights or that the Alabama Canons of Judicial Ethics are regularly and systematically interpreted to permit justices of the Alabama Supreme Court to participate in cases in which they have a substantial interest. Rather, Aetna's sole complaint is that one particular justice on a nine-member appellate court failed to disqualify himself from participating in a single case.

There is no evidence that Justice Embry was not capable of judging this particular controversy on the basis of its own circumstances, or that his participation constituted a clear violation of the Alabama Canons of Judicial Ethics. Under the Alabama Canons of Judicial Ethics, disqualification was not mandatory, but was committed to the sound discretion of Justice Embry. Ala. Canons of Judicial Ethics 3C(1). Justice Embry exhibited no personal bias against Aetna or in favor of the Lavoies. He merely expressed his view that an insurance company should not be able to deny claims in bad faith with impunity. Such prior expression of opinion on is-

sues of policy and law have never formed a sufficient predicate for disqualification, either on statutory or on constitutional grounds. *See Laird v. Tatum*, 409 U.S. 824 (1972); *FTC v. Cement Institute*, 333 U.S. 683, 703-04 (1948). At most, Aetna presents a question of the proper interpretation of the Alabama Canons of Judicial Ethics, a matter peculiarly within the province of the Alabama Supreme Court, and which raises no substantial constitutional question.

The situation in *Berger v. United States*, 255 U.S. 22 (1921), relied on by Aetna (Jurisdictional Statement at 23), is inapposite. *Berger* involved the application of a statute which required recusal once certain affidavits and certificates were filed. This Court's holding was that there was no discretion once the statutory requirements were met and that the recusal decision did not depend upon an evaluation of the contents of the affidavit. Aetna's claims concerning Justice Embry arise in a far different circumstance where there is no provision for automatic disqualification.

Further, the factual predicate for Aetna's contention—that Justice Embry voted against the insurer because of his own personal interests—is belied by his voting record in similar cases during the same period. The first suit complained of by Aetna was filed by Justice Embry on November 23, 1983. Since that date, Justice Embry has participated in twelve decisions involving alleged bad faith denials of insurance claims. In nine of those cases —all of which were decided while Justice Embry was litigating a claim of bad faith against an insurer—Justice Embry voted for the insurer. For example, in *Bowers v. State Farm Mutual Automobile Insurance Co.*, 460 So. 2d 1288 (Ala. 1984), decided one week before the decision in the case at bar, Justice Embry concurred in an opinion affirming summary judgment in favor of the insurer. In *Watkins v. Life Insurance Co. of Georgia*, 456 So. 2d 259 (Ala. 1984), Justice Embry again concurred in a decision holding that the tort of bad faith

did not extend to the wrongful cancellation of insurance policies. *See also Payne v. Nationwide Mutual Insurance Co.*, 456 So. 2d 34 (Ala. 1984); *Armstrong v. Life Insurance Co. of Virginia*, 454 So. 2d 1377 (Ala. 1984); *National Security Fire & Casualty Co. v. Vintson*, 454 So. 2d 942 (Ala. 1984); *Gibson v. Fidelity & Casualty Co. of New York*, 454 So. 2d 526 (Ala. 1984); *Stewart v. State Farm Insurance Co.*, 454 So. 2d 513 (Ala. 1984) (opinion by Embry, J.); *Dickey v. Alabama Farm Bureau*, 447 So. 2d 693 (Ala. 1984); *Garvin v. Shewbart*, 442 So. 2d 80 (Ala. 1983).

Obviously, this voting record contradicts Aetna's conclusion that Justice Embry's filing of two suits improperly prejudiced him against the insurer. In these circumstances, the judgment of the Justices of the Supreme Court of Alabama that Justice Embry's participation in the decision in this case did not require either his or their disqualification does not raise a substantial federal question warranting this Court's review.

C. The Alabama Decisions Do Not Unconstitutionally Impair Aetna's Contractual Obligations

Aetna argues that Alabama's imposition of tort liability for bad faith in handling insurance claims violates the Contract Clause, U.S. Const. art. I, § 10, since it contends that the court's decision retroactively altered Aetna's contractual obligations. Specifically, the Alabama decision purportedly "has added the substantive obligations articulated in 1981 in *Chavers v. National Security Fire & Casualty Co.*, 405 So. 2d 1 (Ala. 1981), upon pain of the infliction of substantial, arbitrary and unpredictable punitive damages." Jurisdictional Statement at 24.

The Contract Clause provides that "No State shall . . . *pass any* . . . *Law* impairing the Obligations of Contracts." U.S. Const. art. I, § 10., cl. 1 (emphasis added). From the very language of the Clause, it is clear that the framers specifically intended to prohibit only state *legislative* acts "which altered the obligations of contracts by

effectively relieving one party of the obligation to perform a contract duty." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 257 (1978) (Brennan, J., dissenting). This Court and other courts have uniformly and repeatedly held that the prohibition set forth in the Contract Clause is directed against impairment by legislative action only, and not by the judicial action of state courts. *Barrows v. Jackson*, 346 U.S. 249, 260 (1953); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924); *Frazier v. Lowndes County Board of Education*, 710 F.2d 1097, 1099 (5th Cir. 1983); *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 859 (3d Cir. 1975); *Propst v. Board of Educational Lands and Funds*, 103 F. Supp. 457, 460 (D. Neb. 1951), *appeal dismissed*, 343 U.S. 901 (1952); L. Tribe, *American Constitutional Law* § 9-5 at 465 n.1 (1978).[16]

Aetna's contention (Jurisdictional Statement at 26-27) that this question was left unresolved in *Tidal Oil* is incorrect. The Court's direct holding was that "[i]t has been settled by a long long of decisions, that the [Contract Clause] is directed only against impairment by legislation and not by judgments of courts." 263 U.S. at 451 (footnote omitted). Thus, there can be no doubt that the actions of Alabama's courts are not within the ambit of the Contract Clause.

Aetna argues, however, that the Court should disregard this long line of unbroken precedent in light of what Aetna regards as 'the simple fortuitous circumstance that [Alabama's] judicial branch, rather than its

---

[16] Aetna also takes a leap of logic in suggesting that the Court's refusal to entertain its Contract Clause challenge would threaten the vitality of First Amendment protections against defamation actions. In Barrows v. Jackson, 346 U.S. 249 (1953), while specifically recognizing that judicial action could constitute "state action" violative of the Equal Protection Clause of the Fourteenth Amendment, the Court specifically rejected any suggestion that such court action could also impair contractual obligations in violation of the Contract Clause. 346 U.S. at 260.

legislative branch, legislated this drastic change in the legal rules governing appellant's contractual relationships with its insureds in Alabama." Jurisdictional Statement at 26. Aetna relies heavily on the Court's decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), to support its assertion that a drastic change in legal rules may violate the Contract Clause, irrespective of which branch of state government created the particular rule.[17]

The fundamental premise of Aetna's argument—that the Alabama decisions recognizing the tort of bad faith denial of insurance claims interfere with its *contractual* relationships—is flawed. The Alabama decisions, unlike the statute in *Spannaus*, do not alter the terms of the contracts between Aetna and its insureds, or increase Aetna's liability under those contracts. Instead, they recognize a duty of good faith in dealing with claimants independent of the obligations created by the contract. While the relationship between the parties may be one that was formed under a contractual arrangement, Alabama is free to recognize the duties that arise from that relationship without violating the Contract Clause. Numerous decisions have imposed upon parties to a contract duties beyond their expectations at the time they originally entered into the transaction.[18] Yet no court has held that the recognition of such tort liability offends the Constitution.

Moreover, the Alabama decisions are in line with numerous other states in imposing a duty of good faith on insurers. *See, e.g., Noble v. National American Life*

---

[17] In *Spannaus*, the Minnesota legislature imposed pension obligations on employers that had not been agreed to at the time of the creation of the pension plan. 438 U.S. at 238-39. The *Spannaus* Court, of course, did not make any reference to the treatment of judicial decisions, since it was reviewing a legislative act.

[18] *See, e.g.*, Caldwell v. Bechtel, Inc., 631 F.2d 989 (D.C. Cir. 1980); McPherson v. Buick Motor Co., 217 N.Y. 382, 11 N.E. 1050 (1916).

Insurance Co., 128 Ariz. 188, 624 P.2d 866 (1981); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal. App. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979); *Gruenberg v. Aetna Life Insurance Co.*, 9 Cal. App. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973); *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978).[19]

The Alabama decisions, therefore, do not present a substantial question of federal law.

D. The Punitive Damage Award Raises No Substantial Federal Question under the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment

Aetna challenges the punitive damage award on two other constitutional grounds. It argues that the amount of the award presents a substantial federal question under the Excessive Fines Clause of the Eighth Amendment, as applied to the States under the Due Process Clause of the Fourteenth Amendment, or alternatively, under the Due Process Clause directly.[20]

The question Aetna has raised based on the Eighth Amendment is, as Aetna itself concedes, one of first impression in this Court. Jurisdictional Statement at 29.

---

[19] Aetna's assertions that Alabama's recognition of the tort of bad faith was a "drastic change" and "unanticipated" do not ring true. In Vincent v. Blue Cross-Blue Shield of Alabama, Inc., 373 So. 2d 1054 (Ala. 1979), the Alabama court emphasized that it had up to that point neither recognized nor rejected the tort of bad faith denial of insurance claims.

[20] Aetna provides little support for its argument that a substantial federal question is raised directly through the Due Process Clause with respect to the purported disproportionality of the punitive damages award affirmed by the Alabama Supreme Court. Although some states appear to require that punitive damages bear some commensurate relation to the amount of an award of compensatory damages, other states have rejected such a requirement. *See generally*, D. Dobbs, *Remedies* § 3.9 (1973).

In order to arrive at the unprecedented result advocated by Aetna, however, this Court would be required to make substantial leaps of logic and precedent. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The plain language of the Amendment, the historical background preceding its ratification, and judicial interpretations all lead to the conclusion that the framers intended the Amendment to place limitations only on the conduct of criminal proceedings. *See Solem v. Helm*, 103 S. Ct. 3006 (1983); *Ingraham v. Wright*, 430 U.S. 650, 664-66 (1977). Indeed, this Court stated more than 150 years ago in considering a challenge under the Excessive Fines Clause, that, "the eighth amendment is addressed to courts of the United States exercising *criminal* jurisdiction". *Ex parte Watkins*, 32 U.S. (7 Pet.) 357 (1833) (emphasis added). To adopt the unprecedented view that punitive damages awarded in a private civil action might constitute excessive fines in violation of the Eighth Amendment would be an unwarranted distortion and expansion of the plain meaning of the Amendment. *See Ingraham v. Wright*, 430 U.S. at 667-68.[21]

Moreover, despite Aetna's unsupported suggestion that this Court held the Eighth Amendment *in toto* applicable to the States through the Due Process Clause of the Fourteenth Amendment, it is by no means evident that

---

[21] Aetna's reference to Justice Brandeis' statement in dissent in Milwaukee Publishing Co. v. Burleson, 255 U.S. 407, 435 (1921), is misdirected. *Burleson* involved an enforcement action instituted by the Postmaster General upon charges that the newspaper's articles violated provisions of the Espionage Act (40 Stat. 217). 255 U.S. at 408-09. Thus, Justice Brandeis' statements were made in the context of a quasi-criminal proceeding, rather than a private civil suit, and would be of questionable applicability to the issue Aetna has framed, particularly in light of more recent decisions of the Court with respect to the Cruel and Unusual Punishments Clause. Ingraham v. Wright, 430 U.S. 650 (1977); Uphaus v. Wyman, 360 U.S. 72, 82 (1958).

the Court has ever incorporated any clause other than the Cruel and Unusual Punishment Clause in the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660 (1962). There is nothing in *Furman v. Georgia*, 408 U.S. 238 (1972), that applies the Excessive Fines Clause to the states. The present case would be particularly inappropriate to address this question in view of the fact that no criminal proceeding is involved. Thus, the imposition of punitive damages on Aetna poses no substantial question of federal law.

CONCLUSION

For the foregoing reasons, the appeal in this case should be dismissed.

Respectfully submitted,

JACK N. GOODMAN *
JOHN A. RITCHIE
ELIZABETH A. FERRELL
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

ALVIN T. PRESTWOOD
Suite 209
One Court Square
Montgomery, Alabama 36104
(205) 832-4120

JOSEPH M. BROWN, JR.
CUNNINGHAM, BOUNDS, YANCE, CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
(205) 471-6191

Attorneys for Appellees

* Counsel of Record

May 9, 1985